Northern Health Facilities, Inc. d/b/a Mountain Laurel Nursing & Rehabilitation Center, a wholly owned subsidiary of Extended Care Health Facilities, Inc. *and* Union of Needletrades, Industrial and Textile Employees, Mid-Atlantic Regional Joint Board, AFL–CIO, CLC. Case 6–CA–30332

April 12, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on February 8, 1999, the General Counsel of the National Labor Relations Board issued a complaint on February 19, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 6–RC–11583. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with additional defenses, admitting in part and denying in part the allegations in the complaint.

On March 15, 1999, the General Counsel filed a Motion for Summary Judgment. On March 16, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its disagreement with the Board's determination in the representation proceeding that the unit licensed practical nurses (LPNs) are not supervisors.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Further, the Respondent's reliance on the decisions of the Third, Fourth, and Sixth Circuits in charge nurse cases fails to acknowledge that the Board's position on the supervisory status of nurses has been upheld by the Seventh, Eighth, Ninth, and District of Columbia Circuits. *NLRB v. Grancare, Inc. d/b/a Audubon Health Care* Center, 160 LRRM 2661 (7th Cir. 1999) (en banc); Lynwood *Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (1997); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 547 (9th Cir. 1997), enfg. 321 NLRB No. 100 (1996) (not reported in Board volumes).

Accordingly, we grant the Motion for Summary Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with a facility in Clearfield, Pennsylvania, has been engaged in the operation of a skilled nursing and rehabilitation facility.

During the 12-month period ending January 31, 1999, the Respondent, in conducting its business operations derived above, derived gross revenues in excess of $100,000 and purchased and received at its Clearfield, Pennsylvania facility goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held December 9, 1998, the Union was certified on January 4, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Clearfield, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

[1] The Respondent's Cross-Motion for Summary Judgment is therefore denied.

B. Refusal to Bargain

About January 4, 1999, the Union, by letter, requested the Respondent to recognize and bargain, and, since about January 12, 1999, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after January 12, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Northern Health Facilities, Inc., d/b/a Mountain Laurel Nursing & Rehabilitation Center, a wholly owned subsidiary of Extendicare Health Facilities, Inc., Clearfield, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Union of Needletrades, Industrial and Textile Employees, Mid-Atlantic Regional Joint Board, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Clearfield, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Clearfield, Pennsylvania, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 12, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 12, 1999

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from the denial of the Employer's request for review of the Regional Director's Decision and Direction of Election in which he found that the Employer's licensed practical nurses were not supervisors within the meaning of the Act. For reasons set out in my dissent in *Troy Hills Nursing Home*, 326 NLRB No. 159 (1998), I dissent here. The issues presented are significant and warrant careful consideration by the Board. Accordingly, and in light of the close scrutiny given by the courts of appeal to the Board's decisions in this area,

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

simply granting summary judgment is not an adequate substitute for the Board's full and careful examination of the record through a grant of review in the underlying representation case.

Accordingly, I dissent from the granting of the General Counsel's Motion for Summary Judgment in this certification-testing proceeding and the findings that the Employer violated Section 8(a)(5) and (1) of the Act.

Dated, Washington, D.C. April 12, 1999

J. Robert Brame III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Union of Needletrades, Industrial and Textile Employees, Mid-Atlantic Regional Joint Board, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WIL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time licensed practical nurses employed by us at our Clearfield, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act and all other employees.